

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6190 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1,2 & 5 Yes. Nos.3 & 4 No.

MAHAJAN KELAVANI MANDAL

Versus

ARVINDKUMAR C PATHAK SINCE DECEASED THROUGH HEIRS& L.R.

Appearance:

Mr.V.S.Mehta for Petitioner-Mahajan Kelavani Mandal.

No one appears for the respondents i.e.legal representatives of respondent No.1 - Arvindkumar Chandulal Pathak.

Mr.V.B.Garania, AGP for respondent nos.2 and 3.

The Gujarat Secondary Education Board is a formal party and is not necessary party. Learned Counsel for the petitioner Mr.Mehta seeks to delete the Gujarat Secondary Education Board from the array of the respondents.

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 28/01/98

This Special Civil Application was filed by the petitioner in this Court on 7.11.1985 against the order passed on 19.6.1985 in Execution Application No. 20 of 1994 by Civil Judge (S.D) Godhra, Annexure 'E' to the petition, whereby the Civil Judge (S.D) Godhra entertained the execution application filed by deceased Arvindkumar Chandulal Pathak directing the Director of Education, Gujarat State to pay the amount equivalent to

the salary and allowances to the respondent after deducting the same from the grant of the Mahajan Kelavani Mandal, Nandisar, district Panch Mahals and that the Director may issue a direction to the District Education Officer, Godhra to disburse the amount to the respondent through Bank within fifteen days from the date of the order. The original respondent Arvindkumar Chandulal Pathak (who has already expired on 20.6.1994) was appointed as Head Master in the High School run by Mahajan Kelavani Mandal, Nandisar on probation for one year on 9.11.1970. An objection was also raised by the District Education Officer against his appointment as Head Master that he did not possess requisite experience for appointment as Head Master. It was also pointed out to the school management that the management will not get any grant for the pay of the respondent appointed as Head Master because he did not possess the requisite experience. The management therefore passed a resolution on 3.9.1971 to terminate the services of the respondent and thus the respondent who was continuing on probation since 9.11.1970 was terminated at the end of the period of probation on 9.11.1971 after informing him through letter dated 16.10.1971 with regard to the objection raised against his appointment by the District Education Officer. This respondent Arvindkumar Chandulal Pathak then filed Civil Suit in the Court of Civil Judge (JD) Godhra on 15.6.1972 challenging the action of the school management and prayed for reinstatement and recovery of the dues of his salary. Thereafter with the coming into force of Gujarat Secondary Education Act, 1972 with effect from 13.12.1973 the suit was transferred to the Tribunal constituted under the Act. The application was numbered as 794/76 before the Tribunal. The Education Tribunal by its judgment and order dated 21.2.1977 refused the relief of reinstatement and directed the payment of dues of salary for the period 1.9.1971 to 7.11.1971 plus one month's notice pay and this amount was directed to be paid to the petitioner on production of carpenter's receipt for the payment of certain amount to the carpenter which this respondent had taken from the account of the school management to be paid to the carpenter.

Aggrieved from the aforesaid order dated 21.2.1977 passed by the Education Tribunal this respondent Arvindkumar Chandulal Pathak preferred Special Civil Application No. 768 of 1997 before this Court and this Court by its judgment and order dated 13/16.10.1978 remanded the case for considering the question of reinstatement. The Tribunal again passed an order on 25.6.1979 in the remanded proceedings and refused the

relief of reinstatement. This respondent Shri Pathak had also filed an application being Application No. 179 of 1979 before the Tribunal praying that he should be paid his dues as if he was on duty throughout right from September, 1971. This application was also rejected by the Tribunal.

Aggrieved from this judgment and order passed by the Tribunal on 25.6.1979 in Application No. 794 of 1976 refusing the relief of reinstatement and backwages, respondent Shri Arvindkumar Chandulal Pathak again approached this Court for the relief of reinstatement with full backwages through Special Civil Application No. 1923 of 1979 and this Court (Hon'ble Mr. Justice N.H. Bhatt) passed an order dated 17.4.1980 refusing the relief of reinstatement but granted wages till 25.6.1979 i.e. date of the order on which the Tribunal decided the remanded matter. This amount was granted by the High Court by way of compensation in lieu of reinstatement. This order dated 17.4.1980 passed by this Court became final qua the parties with the rejection of Letters Patent Appeal by the Division Bench filed by both the sides and even the grievance of the management against grant of the relief of compensation as was moved before the Supreme Court was not entertained. It may be mentioned that respondent Shri Arvindkumar Chandulal Pathak had even filed writ petition under Article 32 of the Constitution of India before the Supreme Court but that petition was not entertained by the Supreme Court and respondent Shri Arvindkumar Chandulal Pathak had withdrawn the writ petition before the Supreme Court filed under Article 32 with a liberty to approach this Court again under Article 226 of the Constitution of India. However, respondent Shri Pathak did not choose to file fresh petition under Article 226 but after a period of nearly 9 years on 27.3.1989 he preferred review application for the review of the order dated 17.4.1980 passed by this Court and during the pendency of this review application preferred on 27.3.1989 respondent Shri Arvindkumar Chandulal Pathak expired on 20.6.1994. In the said review application i.e. Misc. Civil Application No. 394 of 1989 legal representatives of Shri Arvindkumar Chandulal Pathak were brought on record and the review application was argued by the legal representatives of Shri Arvindkumar Chandulal Pathak but that review application has been rejected today by this Court.

So far as the present petition is concerned it is pending since 1985. In this matter rule was issued by this Court on 11.11.1985 and notice of rule had been

served upon Shri Arvindkumar Chandulal Pathak during his life time and Shri S.K.Jhaveri had also entered appearance on his behalf. However, the application was moved by the present petitioner for bringing his legal representatives on record after the expiry of respondent Shri Arvindkumar Chandulal Pathak. Civil Application No. 8407 of 1997 through which legal representatives of Shri Arvindkumar Chandulal Pathak were brought on record was allowed by this Court on 19.1.1998. It may be pointed out that the legal representatives did not appear in Civil Application No. 8407 of 1997 despite service. Mr.S.K.Jhaveri who was present in the Court so as to press the Review Application No. 394 of 1989 in Special Civil Application No. 1923 of 1979 was called upon but he pleaded no instructions. He submits that he had instructions to appear for these very legal representatives in the review application which has been filed by Shri Arvindkumar Chandulal Pathak but he had no instructions from these legal representatives to appear in this Civil Application for bringing his legal representatives on record in the present Special Civil Application No. 6190 of 1995. It is in this background that legal representatives of Shri Arvindkumar Chandulal Pathak, original respondent have not cared to appear despite service. Mr.Jhaveri further submitted that he has no instructions to appear in Civil Application No. 8407 of 1997 i.e. Civil Application moved by the present petitioner for bringing legal representatives on record. The Court may allow the Civil Application for bringing legal representatives on record if they have not appeared despite service but in case notice of Rule in Special Civil Application No. 6190 of 1985 are now issued to the legal representatives (in case they are brought on record) and in case he gets instructions from the legal representatives to appear in this Special Civil Application, he may appear in case he is instructed. The Court feels that the legal representatives have full knowledge with regard to the pendency of this Special Civil Application and it appears that they are deliberately avoiding to appear in the matter although they have been duly served in the application so as to bring them on record as legal representatives of Shri Arvindkumar Chandulal Pathak who had been duly served with this Special Civil Application during his life time. In such circumstances, I do not find it necessary to issue notice of rule to the legal representatives of original respondent Shri Arvindkumar Chandulal Pathak, more particularly when they have not cared to appear in the application for bringing them on record despite service which was moved in this very Special Civil Application. It may also be mentioned that under

explanation below Section 141 of the Code of Civil Procedure the proceedings under Article 226 of the Constitution have been excluded from the meaning of civil proceedings and therefore, procedure with regard to service under the Code of Civil Procedure may not apply with that rigour although general principles with regard to the service do apply. However, the fact remains that in the facts and circumstances of the case, legal representatives of original respondent Shri Arvindkumar Chandulal Pathak have full knowledge about the pendency of this Special Civil Application in which they have been brought on record as being legal representatives from the original respondent and yet did not care to appear despite service and it appears that despite the knowledge of the pendency of this Special Civil Application they have chosen not to appear. Thus this matter which is pending since 1985 i.e. for a period of more than one decade now cannot be made to pend further for issuing notice of rule to these legal representatives in the light of the facts narrated above particularly the fact that the notice of rule of Special Civil Application had been duly served upon the original petitioner Shri Arvindkumar Chandulal Pathak during his life time.

Be that as it may, the fact remains that original respondent Shri Arvindkumar Chandulal Pathak had no order or decree of any Court with regard to reinstatement in service of the petitioner institution, yet he chose to file execution application for the relief of salary as if he was in service and as if he had any such decree or order in his favour, whereas he had none. Not only this, the fact of the matter is that relief of reinstatement had been specifically declined and whatever relief was granted to him by this Court i.e. salary for the period 1.9.1971 to 20.6.1979 as compensation in lieu of the relief of reinstatement was the only relief which the respondent could press and for that purpose also there was no question of filing any execution application before the Civil Court because this relief had been granted in the writ proceedings by this Court in a writ of certiorari against the order of the Education Tribunal. It is also the case of the petitioner institution that the petitioner had withdrawn a sum of Rs.15,000/- directly from the District Education Officer out the grant in aid of the petitioner institution by giving undertaking to the District Education Officer. It is therefore, clear that the application filed before the Civil Judge (S.D), Godhra was wholly misconceived rather illconceived and filing of this execution application and the order dated 27.9.1985 passed therein is clearly an abuse of the process of the Civil Court. The Civil Judge

(S.D) had no jurisdiction whatsoever to entertain this execution application when there was no decree of any Civil Court in favour of the respondent. Thus, I find that the impugned order dated 19.6.1985 which is under challenge in this Special Civil Application was wholly without jurisdiction and cannot be sustained in the eye of law. The order appears to be a non est order and deserves to be set aside. Accordingly, this Special Civil Application is allowed. Impugned order dated 19.6.1985 passed in execution application filed by the respondent is hereby quashed and set aside. Rule is made absolute. No order as to costs.

m.m.bhatt